

CONSTRUCTIVE NOTICE OF CONTRACTING ACTIONS

Copyright Richard D. Lieberman, Consultant & Retired Attorney

“Constructive” is defined as “legally imputed; existing by virtue of legal fiction though not existing in fact.” *Blacks Law Dict.* (Tenth Ed. 2014). Several types of constructive actions occur in government contracting, such as:

- Constructive change (no actual change order)
- Constructive termination for convenience (no actual modification to a contract)
- Contracting Officer’s constructive knowledge of existence of a contract (because of circumstances)
- Constructive notice or knowledge of adverse agency actions (published in the Governmentwide Point of Entry (see below) as starting the clock in bid protests)

Prudential Protective Services, LLC, B-418869, August 13, 2020, is a typical example of constructive notice that triggers the time for a company to submit a timely bid protest. The Government Accountability Office (“GAO”) has strict rules for the timely submission of protests. A protest based on something other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew or should have known the basis for protest. 4 CFR § 21.2(a)(2). The GAO has repeatedly said that publication on the governmentwide point of entry (the “GPE,” defined in FAR 2.101 and formerly www.fbo.gov but now beta.SAM.gov), as expressly designated by statute and regulation as the official public medium for providing notice of federal contracting actions, constitutes constructive notice of contracting actions. The GAO has specifically stated that “[t]he doctrine of constructive notice creates a presumption of notice in law that cannot be rebutted. [citations omitted] By definition, the doctrine imputes knowledge to a party without regard to the party’s actual knowledge of the matter at issue.” *Prudential Protective, Id.*

Prudential Protective involved that company’s protest of the issuance of a sole source task order to North American Security for security services by the Census Bureau. Prudential initially protested the task order on April 1, 2020. The Census advised that it would take corrective action by preparing a new competitive solicitation, and shortly thereafter the GAO dismissed the protest as academic.

Census issued a short-term, sole source task order to North American on June 10, 2020, and on June 15, 2020, published a notice on beta.SAM.gov of the issuance of that task order. On June 29, 2020, Prudential filed its protest of that task order at the GAO (more than 10 days after the notice of award). The GAO dismissed Prudential’s protest because it did not meet the 10 day filing requirement in GAO’s rules. The GAO held that the company was “charged with constructive notice” of actions on the GPE, and therefore, it had to protest within 10 days, i.e., not later than June 25, 2020. The GAO rejected Prudential’s rather obscure argument that the Census bureau failed to post the notice not only on the GPE but on the website of the ordering activity (Census).

Takeaway: Constructive notice of contracting actions is a serious matter. Contractors must pay close attention to the GPE (beta.SAM.gov), and base their actions on when publication takes place in the GPE. The best assumption is that publication in the GPE provides constructive notice—notice which cannot be rebutted. This is true even if an agency normally provides offerors with written notice of awards or other contracting actions. The publication in the GPE will trigger constructive notice.

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